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No. 80-1285

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CARL W. BROWN - - - - - Petitioner

versus

EARL J. HARTLAGE - - - - Respondent

On Writ of Certiorari to the Supreme Court of the United States

AMICUS CURIAE'S BRIEF ON THE MERITS

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PETITION FOR CERTIORARI FILED JANUARY 26, 1981.
CERTIORARI GRANTED MARCH 30, 1981.

QUESTION PRESENTED

Is the interest of the Commonwealth of Kentucky in the integrity of its electoral process such a compelling state interest as to warrant incidental restraint on Petitioner's speech?

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	ii
Table of Authorities	iii–iv
I. Opinions and Judgments Below	1– 2
II. Jurisdiction	2– 3
III. Constitutional Amendments and Statutes Involved	3
IV. Statement of the Case	3– 6
Proceedings in the Trial Court	4– 5
Opinion and Judgment of the Court of Appeals of Kentucky	5
Opinion of the Court on Petition for Rehearing	5
Further Proceedings	5– 6
V. Summary of Argument	6– 8
VI. Argument	8–24
The Compelling State Interest of the Commonwealth of Kentucky	8–10
History and Interpretation of KRS 121.055	10–16
The Test of the State's Compelling Interest	16–17
First Amendment Rights of Petitioner	17–21
VII. Conclusion	21–24
Appendix	25–33

TABLE OF AUTHORITIES

Cases and Statutes: PAGE

KRS 64.527 26
KRS 64.528 26–27
KRS 64.530 27–29
KRS 121.055 29–30
KRS 120.155 30–31

Constitution of Kentucky:

Section 150 31–32
Section 151 32
Section 161 32–33
Section 235 33

Cases:

American Party of Texas v. *White*, 415 U. S. 767 (1974) 17
Arnett v. *Kennedy*, 416 U. S. 134 (1974) 10
Bates v. *Little Rock*, 361 U. S. 516 (1960) 9
Bond v. *Floyd*, 394 U. S. 705 (1969) 21
Broderick v. *Oklahoma*, 413 U. S. 601 (1973) 10
Buckley et al. v. *Valeo et al.* (two cases) 424 U. S. 1 (1976) 8
Chaplinski v. *New Hampshire*, 315 U. S. 568 18–19
Cousins v. *Wigoda*, 419 U. S. 477 ..... 9, 17
Dietz, et al. v. *Zimmer, et al.*, 21 S. W. 2d 999 ..... 11, 12
Draughn v. *Martin*, 350 S. W. 2d 161 (1961)..... 13
Dunn v. *Blumstein*, 405 U. S. 330 (1972) 9
Gooding v. *Wilson*, 405 U. S. 518 (1972) 19
Grayned v. *City of Rockford*, 408 U. S. 104 (1972).. 9, 10
Kramer v. *Union School District*, 395 U. S. 621 (1969) 9
Mills v. *Alabama*, 384 U. S. 214 (1966) 9
McGowan v. *Maryland*, 366 U. S. 420 (1961)..... 20
National Association for the Advancement of Colored People v. *Alabama*, 357 U. S. 449 (1958) .. 9

Cases: PAGE

National Association for the Advancement of Colored People v. *Button*, 371 U. S. 415 (1963) 9, 18
New York Times v. *Sullivan*, 376 U. S. 254 (1964).. 18
O'Brien v. *United States*, 391 U. S. 367 (1968).... 9–10, 10, 19
Owsley v. *Hill*, 275 S. W. 797 (1925) 10, 11, 12
Reynolds v. *Sims*, 377 U. S. 533 (1964) 9
Roth v. *California*, 354 U. S. 476 (1957) 17
Sherbert v. *Verner*, 374 U. S. 398 (1963) 9
Sparks v. *Boggs*, 339 S. W. 2d 480 (1960)..... 12
Speiser v. *Randall*, 357 U. S. 513 .....16, 19
Stromberg vi *California*, 283 U. S. 359 17
Thomas v. *Collins*, 323 U. S. 516 (1945) 9
United States Civil Service Commission v. *National Association of Letter Carriers*, 413 U. S. 548 (1973) 10
Williams v. *Rhodes*, 393 U. S. 23 9
Yick Wo v. *Hopkins*, 118 U. S. 356 (1886) 9

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

AMICUS CURIAE'S BRIEF ON THE MERITS

The name of all the parties to this proceeding are stated in the caption of this case as given above.

I. OPINIONS AND JUDGMENTS BELOW

The Amicus Curiae adopts the Joint Appendix of this case and Petitioner's statements of the nonreported matters as follows:

The Order Denying Petitioner's Motion for Discretionary Review before the Supreme Court of Kentucky is not reported, J.A. 41, December 9, 1980.

Earlier opinions in the suit are also not reported, and are as follows:

Findings of Fact, Conclusions of Law and Opinion, Jefferson Circuit Court, Jefferson County, Kentucky, on the merits, J.A. 18, February 6, 1980.

Judgment of the Jefferson Circuit Court, Jefferson County, Kentucky, J.A. 27, February 12, 1980.

Final Judgment and Opinion of the Court of Appeals of Kentucky, J.A. 29, August 8, 1980.

Opinion and Order Denying Petition for Rehearing Court of Appeals of Kentucky, Commonwealth of Kentucky, J.A. 38, October 29, 1980.

Proceedings in the case subsequent to the Order Denying Petitioner's Motion for Discretionary Review also not reported were as follows:

Orders entering a Stay of Court of Appeals of Kentucky Mandate, Court of Appeals of Kentucky, Commonwealth of Kentucky, J.A. 42-43, December 10, 1980 and December 16, 1980.

Order for Substitution of Counsel, Court of Appeals of Kentucky, Commonwealth of Kentucky, J.A. 44, December 16, 1980.

The Amicus Curiae was appointed by the Court's Order of October 19, 1981, which appears in the Appendix to this brief.

II. JURISDICTION

The Amicus Curiae adopts the statement of jurisdiction as stated by the Petitioner as follows:

The Order denying Petitioner's Motion for Discretionary Review in the Supreme Court of Kentucky

was entered December 9, 1980, and the Petition for Certiorari was filed in this Court on January 26, 1980 within the time allowed by the United States Code, Title 28, Section 2101(c). The judgment of the Court of Appeals of Kentucky, of which review and reversal is here sought is a final judgment within the meaning of the jurisdictional statute, 28 U.S.C., Section 1257(3).

III. CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Amicus Curiae asserts the statutes of the Commonwealth of Kentucky, as construed, in controversy are a valid exercise of the Commonwealth's protection of its compelling state interest in the integrity of the electoral process and are not a violation of the Petitioner's rights under the First and Fourteenth Amendments to the Constitution of the United States. In developing the Amicus Curiae's argument, he will rely on the statutes which appear in the Appendix hereto, as being reasonable, validly construed, not vague nor overbroad and not inhibiting. The statutes in the Appendix are made a part of this brief.

IV. STATEMENT OF THE CASE

The case at Bar results from an election contest initiated by the Respondent against the Petitioner. The Respondent and Petitioner were candidates for election to the office of Commissioner of the Jefferson County, Kentucky, Fiscal Court. This is the legislative body of the county government in Jefferson County,

Kentucky. As required by the statute in question, the Respondent filed an action against the Petitioner in the Jefferson Circuit Court. The suit, which appears at Joint Appendix Page 9, alleged the Petitioner violated the Kentucky Corrupt Practices Act by making a statement in violation of KRS 121.055 (See Appendix hereto). The Petitioner denied the violation but admitted the statement.

The Petitioner's statement of August 15, 1979, which appears at Joint Appendix Page 1, offered, inter alia, to serve for a salary less than the statutorily mandated salary of $20,000 for a Commissioner of the Jefferson Fiscal Court. The statement also contained other criticisms of government spending. The criticisms of government spending and other matters were not contested, it being obvious they were not violations of the statute, KRS 121.055.

On August 19, 1979, the Petitioner admitted the illegality of his August 15, 1979 offer to serve for less than the statutorily mandated salary. The August 19, 1979 statement appears in the Joint Appendix at Page 4 and 5.

The Petitioner defeated the Respondent in the general election on November 6, 1979.

Proceedings in Trial Court

On December 4, 1979, Respondent, pursuant to KRS 120.015 filed an action in the Jefferson Circuit Court alleging a violation of KRS 121.055.

The case was tried on January 29 and 30, 1980. The trial court found a violation of KRS 121.055 and held the Petitioner's statement an unlawful promise to the electorate. The trial court, however, relying on other items did not void the election. The court costs were assessed against the Petitioner.

Opinion and Judgment of the Court of Appeals of Kentucky

Respondent filed an appeal with the Court of Appeals which reversed the Circuit Court's not voiding the election. The Court of Appeals dismissed the Petitioner's appeal for failure to post a supersedeas bond, and in the judgment and opinion of the Court of Appeals, the election was voided. The judgment and opinion of the Court of Appeals may be found in Joint Appendix Page 29.

Opinion of the Court of Appeals of Kentucky on Petition for Rehearing

The Court of Appeals denied Petitioner's Petition for Rehearing on October 29, 1980. This denial appears in Joint Appendix Page 38.

Further Proceedings

The Kentucky Supreme Court on December 9, 1980 denied the Petitioner's Motion for Discretionary Review. This Order appears in the Joint Appendix Page 41.

Subsequent to the Kentucky Supreme Court's denial of discretionary review, the Petitioner, on December 10, 1980, was granted a stay of the Court of Appeals

voiding of the election and on December 16, 1980 was granted an additional stay until March 9, 1981 to permit the Petitioner to appeal to the Supreme Court of the United States. The stay of December 10, 1980 is found at the Joint Appendix Page 42. On December 16, 1980 the Court of Appeals allowed substitution of counsel. The Order appears at Joint Appendix Page 44.

The Petitioner subsequently filed an application with the United States Supreme Court requesting a stay of the Court of Appeals' voiding of the election. The Court, through Associate Justice Potter Stewart granted the stay on February 18, 1981 and said Stay Order appears in the Joint Appendix at Page 45.

A Certiorari was granted by this Court on March 30, 1981.

Subsequently, the Amicus Curiae was appointed by the Court on October 19, 1981.

V. SUMMARY OF ARGUMENT

The Court of Appeals of Kentucky followed a long line of well reasoned, logical opinions of Kentucky's highest courts which found a promise to serve at a reduced salary to be a violation of KRS 121.055. Nothing in the Court's Opinion violated any provision of the Constitution of the United States of America nor did violence or variance to any of this Court's prior decisions. This Court has held consistently that the rights under the First and Fourteenth Amendment are not absolute but may be subject to reasonable, ra-

tional restraint if an equally compelling right is involved. Nothing in the procedures or proceedings of the case to this stage has violated any right under the First or Fourteenth Amendment of the Constitution of the United States of America to question government, its operation or any other exercise of the First Amendment Right other than to assert the paramount interest of the Commonwealth of Kentucky in protecting the integrity of the electoral process.

In the argument of the Amicus Curiae no unreasonable or prior restraint is sought on any right of the Petitioner. In fact, the rights of free swinging debate are encouraged. The argument, however, does develop the state's paramount interest in protecting its electoral process and relies upon the historical, even-handed and logical application of the statute KRS 121.055. The statement is made that in order to balance the two sacred rights of free speech and the state protecting its compelling interest, the state must prevail unless it unreasonably, unseasonably and unjustifiably intrudes on the Petitioner's right of free speech.

The Amicus Curiae admits to the Court that this is a regrettable case, as any case involving the electoral process. In the course of the argument, however, the Amicus Curiae traces the history of the statute, its development and particularly the minimum restraint on the free speech of the Petitioner and the minimum nature of the penalty. This is a noncriminal statute and at worse, the Petitioner would be called upon to again submit himself to the voters, without the promise of legally impermissible and impossible acts,

for the electorate's verdict. The integrity of the electoral process, the noncriminal nature of the statute, and the balancing of the two important rights involved will be the basis of the Amicus Curiae's argument for sustaining the lower court.

The Amicus Curiae submits to the Court and will argue, that this statute is neither vague nor overbroad. It has been clearly interpreted for over fifty (50) years and the interpretation of the statute has removed any question of vagueness or overbreadth. There are limitations on acts which can be described in a statute. In the case at Bar there is no problem of vagueness or overbreadth and the Amicus Curiae will so argue.

VI. ARGUMENT

The compelling state interest of the Commonwealth of Kentucky; History and interpretation of KRS 121.055; The test of the state's compelling interest; First Amendment rights of Petitioner; Conclusion.

The Compelling State Interest of the Commonwealth of Kentucky

The Commonwealth of Kentucky has a compelling interest in the integrity of the electoral process and the statute, KRS 121.055, is a valid protection of said interest, and has been interpreted in a manner consistent with *Buckley* v. *Valeo,* 424 U. S. 1 (1976).

It cannot be doubted, disputed or debated that the protection of the integrity of the electoral process and the assurance of effective and meaningful suffrage is

a right and responsibility of the state well recognized by this Court. *Cousins* v. *Wigoda,* 419 U. S. 477 (1975); *Yick* v. *Hopkins,* 118 U. S. 356 (1886); *Reynolds* v. *Simms,* 377 U. S. 533 (1964); *Williams* v. *Rhodes,* 393 U. S. 23 (1968); *Kramer* v. *Union School District,* 395 U. S. 621 (1969); *Dunn* v. *Blumstein,* 405 U. S. 330 (1972); *Mills* v. *Alabama,* 384 U. S. 214 (1966).

This type interest, vis a vis the First Amendment, has been described, as compelling (*NAACP* v. *Button,* 371 U. S. 415 (1963); *Sherbert* v. *Verner,* 374 U. S. 398 (1963)); substantial (*NAACP* v. *Button,* 371 U. S. 415 (1963); *NAACP* v. *Alabama,* 357 U. S. 449 (1958)); subordinating (*Bates* v. *Little Rock,* 361 U. S. 516 (1960)); paramount (*Thomas* v. *Collins,* 323 U. S. 516 (1945); *Sherbert* v. *Verner,* 374 U. S. 398 (1963)); cogent (*Bates* v. *Little Rock,* 361 U. S. 516 (1960)); strong (*Sherbert* v. *Verner,* 374 U. S. 398 (1963)); weighty (*Grayned* v. *City of Rockford,* 408 U. S. 104 (1972)).

The characterization and parameters of the interest which must appear, to justify regulations have been well defined and stated in *United States* v. *O'Brien,* 391 U. S. 367 (1968) where the Court held as follows:

> "Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

History and Interpretation of KRS 121.055

The Legislature of the Commonwealth of Kentucky, acting pursuant to a mandated provision of the Constitution of the Commonwealth of Kentucky (Sections 150-151) enacted the current statute, and predecessor statutes, pursuant to the mandate.

Several things are to be noted about this statute, (1) it applies to *all* candidates including the members of the legislature who enacted it, and was not enacted for any nefarious, unworthy, untenable or other unacceptable or unapprovable reasons. (2) This was not a statute that applied one standard to one group of candidates and another to other sets of candidates. (3) The statute contains elements of non-speech conduct as well as conduct relating to speech. (4) The statute has been thoroughly construed, and such construction now becomes a part of the statute, in such a way remove any hint of vagueness or overbreadth and meet the test(s) as follows: *Broderick* v. *Oklahoma,* 413 U. S. 601 (1973), *O'Brien* v. *United States,* 391 U. S. 367 (1968), *United States Civil Service Commission* v. *National Association of Letter Carriers,* 413 U. S. 548 (1973), *Grayned* v. *City of Rockford,* 408 U. S. 104 (1972) and *Arnett* v. *Kennedy,* 416 U. S. 134 (1974).

The statute was first interpreted in the case of *Owsley* v. *Hill,* 275 S. W. 797 (1925). This was the

first authoritative interpretation of the predecessor statute to the present one since its enactment. Any tinge of overbreadth or vagueness was removed in this case and, in addition, any significant limitation on a candidate's right to free speech was erased forever. The Kentucky Court set the standard by which the statute would become triggered. That standard, which remains the law to this hour, is that a candidate's right to free speech is not at all limited if the *act* which he or she promises or advocates is one which is *permitted* by the Constitution and/or Statutes of the Commonwealth of Kentucky. In the *Owsley* v. *Hill* case the appeal was dismissed on the obvious grounds that the promise which the candidate made, exercising his rights under the First and Fourteenth Amendments, was fully capable of being performed since the salary had not yet been set, the Court saying

> "The contestee here did not propose to perform the duties of his office at a rate less than that fixed by law, but simply proposed to fix that salary at a time when it came to be fixed at a rate less than that which had prevailed during the preceding term."

This remained the constant in *Dietz, et al.* v. *Zimmer,* 21 S. W. 2d 999, the Court voiding an election wherein the candidates had promised, if elected, to elect a city manager, the city manager's salary to be paid from the successful condidate's (by then office holder) salary. The Court, in voiding the election, said

> "The promise in the present instance was not only to spend money for a purpose not authorized

> by law (hiring a city manager) but it also involved the discharge of official duties for less than the salaries *fixed therefor*" (emphasis added).

This was, and remains, not permissible under interpretations of the highest Court of Kentucky as it relates to the conduct of campaigns in the Commonwealth.

Subsequent to the *Owsley* and *Zimmer* cases the highest court decided the case of *Sparks* v. *Boggs*, 339 S. W. 2d 480 (1960). In this case the Court found the candidate guilty of violating the statute, and stated

> "The material difference between the case of *Owsley* v. *Hill* and the one at Bar is that the annual salary of a Commissioner for Hazard had already been fixed by law for the new term, whereas such had not been done in respect to the county attorney's office in controversy in *Owsley* v. *Hill*."

In the *Sparks* case the salary had already been fixed and it was on this basis the Court held the statute to have been violated since the candidate promised an act forbidden by the law of the Commonwealth of Kentucky and in addition, would be violative of the Constitution of the Commonwealth of Kentucky (Sections 161 and 235) since the salary could not be changed during the term for which the candidate was elected. It was a legal and constitutional impossibility for the candidate to deliver what he had promised in the *Sparks* case since the salary had already been set, but it was not a statutory or constitutional impossibility to do so in the *Owsley* case. This is the important

area of concern for the application of the statute. It further narrowed and clarified the statute. The Court of Kentucky in interpreting this statute has clearly and unequivocally established that candidates are free to say anything not otherwise proscribed by the First Amendment in an election campaign and that the line is crossed *only* if the act promised is a legal impossibility under the statutes or Constitution of Kentucky. This is a valid distinction.

The doctrine was affirmed in *Draughn* v. *Martin,* 350 S. W. 2d 161 (1961), wherein a candidate for tax commissioner promised not to tax certain taxable property. The Court in the decision pointed out that all property was subject to taxation except that exempted by Section 170 of the Constitution of the Commonwealth of Kentucky and that the promise was thus a nullity. It compared this promise to its long established rule of offering to serve for less than the reduced pay, which had already been condemned, and that the offer of tax leniency offers to reduce pro tanto the taxes which the citizens of the county would pay and thus was an offer of something of value.

The Court's attention is called to the Kentucky Court's observation in this case that the fact of there not being much taxable property for which the leniency was promised by the candidate in the county in which he was seeking election was of no avail since the promise itself was the gravaman of the offense and not the dollars and cents available as a result of the promise. The promise could not be carried out be-

cause of the statute, as interpreted, and the Constitution of the Commonwealth of Kentucky.

The interpretations of the statute by the Courts of the Commonwealth of Kentucky show, without dispute, that the First Amendment Rights of any candidate are not limited except when the candidate promises something which as a *matter of law* could not be delivered.

Another cogent observation of the operation and interpretation of the statute appeared in the *Sparks* case wherein the Court ruled that the acts of the Court in an election contest for the violation of the statute was in the "nature of an inquiry into the purity of an election." This points out the overwhelming state interest which is at stake. To make this act as odious as possible the enabling statute, KRS 120.155, requires the losing candidate to bring the action and does not permit a taxpayer or other type derivative action. This sets the stage: The acts proscribed in the statute may only be challenged by a losing candidate which, at best, is suspicious and not a case upon which courts look with favor, the loser suing the winner. However, the Court in the *Sparks* case indicating it as an inquiry into the purity of the election, asserts the state's interest in this compelling and subordinating state interest. The statute does not do more than require the rerunning of the election. It is not a penal statute, the loser is not declared the winner, and the winner even if his or her election is voided is permitted to run again and seek the office. So, the purity of the state's paramount and compelling interest is put into effect only if a losing candidate

can convince a court that the winning candidate demonstrably violated the statute by promising something prohibited by law. The statute therefore is not state action initiated to intrude on the electoral process.

Candidates for office in Kentucky are permitted, and usually do, make extravagant promises and offer fantastic schemes for election. By the narrowing of the interpretive effect of the statute the highest court of the state has limited this extravagance merely to the point of forbidding matters which, as a matter of law, are not deliverable. It further softens the impact by allowing the voided candidate to rerun if desirous.

It cannot be disputed that in the present case the salary for the office which the Petitioner sought had already been set pursuant to KRS 64.530 when he made his offer to serve at a reduced salary. From the line of cases cited above this was a promise of an act which could not, under Kentucky law, be delivered. The trial court, with due observation to the rights of all parties, found the Petitioner had violated the statute. With commendable motives the trial court, even though the Petitioner had admitted the statement, did not void the election because of the five reasons given in the joint appendix at Page 25. It is not the purpose of this brief to say more about the five items listed by the trial court than to say as equitable as the trial judge hoped to be, the five grounds given were not, and are not, defenses to the violation of the statute, KRS 120.015. On review the Court of Appeals of Kentucky (Joint Appendix, Page 29) rejected the

Trial Court's rationale. It is important to note the statement contained several promises, none of which were attacked, nor indeed could be attacked, except the salary reduction promise which, for the reasons stated above, was an act impossible of performing under Kentucky Law. The statement referred to as a "retraction" (Joint Appendix, Page 4) was not in fact a retraction but basically a restatement of the original impermissible statement. Not one word has been raised however in objection to the promise of reducing government spending generally.

The Test of the State's Compelling Interest

There was no attempt to control speech but rather to protect, from an evil shown to be great, some interest clearly within the sphere of governmental concern.

> "The purpose was to achieve an objective other than restraint on speech. Only the *method* of achieving this end touched on protected rights and that only tangetially." (Emphasis added.) *Speiser* v. *Randall,* 357 U. S. 513 (1958).

The evil at which Congress had attempted to strike in that case was thought sufficiently grave to justify limited enfringement on protected rights.

It has further been held and established as a reasonable test.

> "There are governmental interests sufficiently important to outweigh the possibility of enfringement, particularly when the 'free functioning of our national institutions is involved.'" *Communist Party of the United States* v. *Subversive Activities Control Board,* 6 L. Ed. 2d 625 (1961).

"Significant interference with protected rights of political association may be sustained *if* the state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of *associational* freedoms." *Cousins* v. *Wigoda,* 419 U. S. 417.

"Principal has been developed that restriction on the electoral process must survive exacting scrutiny. The restriction can be sustained only if it furthers a 'vital' governmental interest." *American Party of Texas* v. *White,* 39 L. Ed. 2d 744.

It is submitted KRS 121.055 meets the tests asserted and is a valid and permissible exercise of vital, fundamental authority.

First Amendment Rights of Petitioner

There can be no doubt, and none is asserted, that the First Amendment guarantees of the Constitution of the United States of America, as applied by the Fourteenth Amendment to the Constitution, assure the securing of freedom of speech "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *California,* 354 U. S. 476 (1957). Further, "the maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the republic, is a fundamental principal of our constitutional system." *Stromberg* v. *California,* 283 U. S. 359.

The "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times* v. *Sullivan,* 376 U. S. 254 (1964). This right needs "breathing space." *NAACP* v. *Button,* 371 U. S. 415 (1963). One of the signal manifestations of the Constitution is its insistence and encouragement of free swinging discussions, uninhibited and not chilled, of public questions. No right is more precious. This Court, in a long line of decisions, has recognized, enforced, and protected this valuable right. The protection thus afforded and the veneration accorded this doctrine is cemented in the law of this land. The Court has, however, as a rational and integral part of the doctrine found it to be not absolute. The recognition of this lack of the absolute nature of this right has not been one to diminish it, but on the contrary one to define it. To adopt an absolutist point of view could lead to anarchy. To dilute the underpinning of this valued right could lead to a police state. Thus, the approach taken throughout the history of the Court has not been to *dilute* the right, but to establish sensible, logical and rational basis for its *application* by balancing the rights involved. The Court has taken the view that some things are not within the protected right when viewed from the perspective of judicial determination and public policy as reflected by statutes protecting compelling state interests.

The Court has taken the logical position that not all expression is protected (*Chaplinski* v. *New Hamp-*

shire, 315 U. S. 568), the same case holding the Constitutional guarantees of freedom of speech forbid the states from punishing the use of words or language not within "narrowly limited cases of speech." In *Spieser* v. *Randall,* 357 U. S. 513 this Court amplified the doctrine by stating, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is firmly drawn." In directing Congress and Legislatures in the drafting of legislation to meet the *Spieser* test, the Court in *Gooding* v. *Wilson,* 405 U. S. 518 (1972), once again to gain the full perspective, held "the statute must be carefully drawn or be *authoritatively construed* to punish only unprotected speech and not be susceptible of application to protected expression."

KRS 121.055 has been authoritatively construed and the line *clearly drawn.*

This Court, as a further assistance in drafting legislation which might be found to have an "incidental" limitation on a protected right, has given direction in *O'Brien* v. *United States,* 391 U. S. 367 (1968) stating four elements must be present when the incidental limitation (not the dilution) of the First Amendment freedom is permitted must occur. They are:

1. It must be within the Constitutional power of the government, in this case the legislature of the Commonwealth of Kentucky. That the regulation of election conduct is within the Constitutional power of the legislature of the Commonwealth of Kentucky cannot be disputed.

2. It must further an important or substantial or governmental interest. This iikewise cannot be disputed.

3. The governmental interest must be unrelated to the suppression of free expression. By the authoritative interpretation of the statute in question, KRS 121.055, it cannot be disputed that the statute includes many non-speech elements and that the gravamen or the evil sought to be corrected is not merely directed to expression.

4. The incidental restriction on an alleged First Amendment right must be no greater than is essential to the furtherance of that interest. As the interpretations of the statute in question have shown consistently, the line now drawn is the narrowest of all lines possible and the restriction minimal.

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in pratcice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts may reasonably be conceived to justify it." *McGowan* v. *Maryland,* 6 L. Ed. 2d 393.

An erroneous statement and a pledge to do something demonstrably against the law are not on an equal footing and deception shouldn't be given the same standing as advocacy — this distinction doesn't reduce the "breathing space" free expression requires.

It is well within the state's authority and power to enact statutes which forbid the injection of matters, possibly corrupting in their tendencies, which divert the observation and evaluation of candidates on the basis of their merit and fitness for the job. The public policy inherent in the statute is vindicated by being assured candidates for office and office holders are not limited to those willing to serve for reduced pay because of their individual wealth, those who ascribe methods of obtaining income to other than the salary, and those who really have no desire to be of service but just want the job for the sake of the job. The state would go beyond the permissible boundary of authority if it dictated who could be candidates and under what circumstances the candidates might speak or limit the content of their speeches or forbid speech or matters not affecting the discharge of the office. *Bond* v. *Floyd,* 394 U. S. 705 (1969). The statute at bar does no violence to the concept.

VII. CONCLUSION

This case presents a clash between two precious, fundamental and well-defined concepts; the right of free speech by a candidate and the state's compelling interest and obligation to insure fair elections and meaningful suffrage. The problem confronting the court is to balance these rights.

The amicus curiae urges the Court to sustain the judgment of the Kentucky Court. There are numerous reasons for seeking this course.

The non-criminal statute, as interpreted by the courts of Kentucky furthers an important state obligation. The state has no right to dictate who may be candidates. It does have a right, even an obligation, to take reasonable steps to assure the *purity* of the electoral process. The legislature of Kentucky has provided for the protection of this interest by KRS 121.055. This statute as interpreted, draws with surgical precision the line beyond which candidates may not go. An examination of this statute shows several things:

It was not designed nor passed for an unreasonable, outrageous nor obnoxious reason, as some of the statutes this court has examined in the past. It was, and is, not a harassing nor frustrating statute. It leaves open, and properly, the full freedom of expression required under the First Amendment. It is not a statute directed at speech or expression. It is a statute to further the legitimate public obligation of the state to prevent acts which detract or retard the electoral process. It is not self-starting nor state enforced. It comes into action *only* when a candidate who loses sues the candidate who wins. If the losing candidate doesn't assert the corruption of the process, no one else, specifically the state, can. When the state acts, it is only in its role of arbiter. It finds no one guilty, assesses no fine, does not imprison or find one guilty of fraud. It does not replace the winner with the loser. It merely finds the well-defined line crossed and orders a new exercise of the electoral process by the electorate. It

does not forbid the same candidates running again. The line spoken of is simply the line between lawfully deliverable or permissible acts and those which *as a matter of law* cannot be produced. Not one case interpreting this statute has varied from this beacon. This places no impermissible burden on the candidate.

This history of this nation is regrettably replete with examples of attempted abusive and regressive state action, especially where basic human and constitutional rights have sought expression, whether in voting, demonstrating or otherwise seeking redress of wrong. This Court has correctly protected the rights of citizens, whether individual or in association, against unwarranted, unnecessary and unreasonable acts of government. The case at bar is not such a case. No candidate has a constitutional right to inject in the electoral process acts demonstratively impossible of legal achievement. To prohibit same is a valid exercise of state authority. This is precisely what the Kentucky Statute KRS 121.055 does, and should be permitted. Anytime any Legislative body acts someone is restrained or directed. It is only the unreasonable assertion of the state's power which is proscribed.

Even if the Court should find, in the case at bar, impermissible state restraint on the Frst Amendment rights of the Petitioner, the entire statute should not fall. The statute contains non-speech and speech elements. In reality the speech elements is not affected unless it intrudes on non-speech matter (performance of an act not lawfully possible). There are numerous and valid non-speech acts condemned by the statute.

They are measurable and identifiable and should, under no circumstances, be struck down. To do so would be to do violence to the entire electoral process in Kentucky, not justified by the controversy before the Court. The controversy before the Court is unfortunate. It can be corrected by the court sustaining the Kentucky Court's decision which would afford the electorate an opportunity to elect a candidate in an election free of impermissible acts. The statute in controversy involves at most, incidental restraint, not chilling, but on the contrary liberating and directional, drawing sensible, perceivable, reasonable parameters for proper conduct of the electoral process.

For the reasons cited herein the amicus curiae urges the Court to sustain the Court below.

Respectfully submitted,

L. Stanley Chauvin, Jr.
2720 Citizens Plaza
Louisville, Kentucky 40202
(502) 587-0553

Counsel for Amicus Curiae

APPENDIX

Office of the Clerk
SUPREME COURT OF THE UNITED STATES
Washington, D.C. 20543
October 19, 1981

L. Stanley Chauvin, Jr., Esq.
Carroll, Chauvin, Miller & Conliffe
27th Floor, Citizens Plaza
Louisville, Kentucky 40202

RE: Carl W. Brown
v. Earl J. Hartlage
No. 80-1285

Dear Mr. Chauvin:

The Court today entered the following order in the above-entitled case:

"L. Stanley Chauvin, Jr., Esquire of Louisville, Kentucky, a member of the Bar of this Court, is invited to brief and argue this case, as *amicus curiae*, in support of the judgment below."

Very truly yours,
Alexander L. Stevas, Clerk
/s/ By Francis J. Lorson
Chief Deputy Clerk

rwk
cc: Victor L. Baltzell, Jr., Esq.
Fred M. Goldberg, Esq.
Honorable Steven L. Beshear

64.527. Annual computation of consumer price index for determination of rate of adjustment of compensation of elected county officials.—In order to equate the compensation of county judges/executive, county clerks, sheriffs, justices of the peace, county commissioners, coroners and jailers with the purchasing power to the dollar, the executive department for finance and administration shall compute by the second Friday in February of every year the annual increase or decrease in the consumer price index of the preceding year by using 1949 as the base year in accordance with section 246 of the Constitution of Kentucky which provides that the above elected officials shall be paid at a rate no greater than seven thousand two hundred dollars ($7,200) per annum. The executive department for finance and administration shall notify the appropriate governing bodies charged by law to fix the compensation of the above elected officials of the annual rate of compensation to which the elected officials are entitled pursuant to the increase or decrease in the consumer price index. Upon notification from the executive department for finance and administration, the appropriate governing body may set the annual compensation of the above elected officials at a rate no greater than that stipulated by the executive department for finance and administration. (Enact. Acts 1974, ch. 254, § 1; 1976, ch. 283, § 1; 1976 (Ex. Sess.), ch. 14, § 38; 1976 (Ex. Sess.), ch. 20, § 6, effective January 2, 1978; 1976 (Ex. Sess.), ch. 17, § 19, effective January 1, 1978; 1978 ch. 384, § 582, effective June 17, 1978.)

* * * * * * * *

64.528. Compensation of specified officials adjusted to current purchasing power of the dollar.—In order to equate the current rate of compensation of commonwealth's attorneys, county clerks, county judges/executive, county attorneys, sheriffs, jailers, justices of the peace, and com-

missioners with the present value and purchasing power of the dollar, the court required by law to fix the compensation of the officials named in this section may, on or before September 1, 1974, adjust said officials' compensation within the limits set forth in Acts 1974, chapter 254 and may provide that said officials be entitled to the maximum amount of compensation for the entire 1974 calendar year. (Enact. Acts 1974, ch. 254, § 7; 1976 (Ex. Sess.), ch. 14, § 39; 1976 (Ex. Sess.), ch. 20, § 6, effective January 2, 1976; 1978, ch. 384, § 130, effective June 17, 1978.)

* * * * * * * *

64.530. Compensation of county officers and employes, and members of fiscal court.—(1) Except as provided in subsections (5) and (6) of this section, the fiscal court of each county shall fix the compensation of every county officer and employe except the officers named in KRS 64.-535 and the county attorney. The fiscal court may provide a salary for the county attorney.

(2) For the purposes of this section, justices of the peace and constables in all counties shall be deemed to be county officers and deputies or assistants of county officers shall be deemed to be county employes, but employes of county boards or commissions which are now authorized by law to fix the compensation of their employes shall not be deemed to be county employes for the purposes of this section.

(3) In the case of officers compensated from fees, or partly from fees and partly by salary, the fiscal court shall fix the maximum compensation that any officer except the officers named in KRS 64.535 may receive from both sources. The fiscal court may also fix the number of deputies and assistants, and, the compensation thereof, and the maximum amount that the officer may expend each year for expenses of his office.

(4) In the case of county officers elected by popular vote and the county attorney, in the event the fiscal court provides him a salary, the monthly compensation of the officer and of his deputies and assistants shall be fixed by the fiscal court not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term but the compensation of his deputies or assistants may be reviewed and adjusted by the fiscal court not later than the first Monday in May of any successive year upon the written request of the officer. On or before August 1, 1966, the fiscal court shall fix the salary provided herein for the county attorneys for the term commencing in January, 1966, notwithstanding any other provisions of this section which may be inconsistent herewith.

(5) Nothing in this section shall apply to property valuation administrators or their deputies, assistants and expenses, in any county, or to the circuit court clerk, county clerk, sheriff, jailer, and their deputies, assistants and expenses, in counties having a population of seventy-five thousand (75,000) or more.

(6) Justices of the peace serving on a fiscal court in any county, and county commissioners serving on a fiscal court in any county other than one (1) containing a city of the first, second, third or fourth class, shall be paid for their services, out of the county treasury, not to exceed the maximum compensation allowable under KRS 64.527. The fiscal court shall fix the amount to be received within the above limit, but no change of compensation shall be effective as to any member of a fiscal court during his term of office. The compensation of county commissioners serving on fiscal courts in counties containing a city of the first class shall not exceed nine thousand six hundred dollars ($9,600) per year, in counties containing cities of the second class it shall not exceed nine thousand dollars

($9,000) per year and in counties containing cities of the third or fourth class it shall not exceed twenty percent (20%) more than the annual compensation paid in the county for the calendar year immediately preceding 1974, and all of said annual salaries shall be payable monthly. Justices of the peace and county commissioners shall not receive any compensation for their services on the fiscal court, other than as provided by this section; nor shall they receive any compensation for serving on committees of the fiscal court. The fiscal court shall fix the amount to be received within the above limit, but no change of compensation except as provided in KRS 64.285 shall be effective as to any member of a fiscal court during his term of office. (Enact. Acts 1950, ch. 123, § 9; 1956, ch. 144; 1958, ch. 126, § 2; 1962, ch. 214, § 1; 1964, ch. 109, § 3; 1966, ch. 15, § 2; 1966, ch. 255, § 75; 1968, ch. 152, § 33; 1970, ch. 203, § 1; 1972, ch. 30, § 1; 1972, ch. 203, § 5; 1972, ch. 358, § 1; 1974, ch. 60, § 2; 1974, ch. 254, § 4; 1976, ch. 306, § 1; 1976 (Ex. Sess.), ch. 17, § 20, effective January 1, 1978; 1976 (Ex. Sess.), ch. 14, § 40, effective January 2, 1978; 1978, ch. 196, § 1, effective June 17, 1978; 1978, ch. 384, § 131, effective June 17, 1978.)

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121.055. Candidates prohibited from making expenditure, loan, promise agreement or contract as to action when elected, in consideration for vote.—No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote

or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract. (Enact. Acts 1974, ch. 130, § 182; 1980, ch. 292, § 3, effective July 15, 1980.)

* * * * * * *

REGULAR ELECTIONS

120.155. Contest of regular election of officers other than governor, lieutenant governor, general assembly member and certain city officers.—Any candidate for election to any state, county, district or city office (except the office of governor, lieutenant governor, member of the general assembly, and those city offices as to which there are other provisions made by law for determining contest elections), for whom a number of votes was cast equal to not less than twenty-five per cent (25%) of the number of votes cast for the successful candidate for the office, may contest the election of the successful candidate, by filing a petition in the circuit court of the county where the contestee resides, unless the officer is one elected by the voters of the whole state, in which case the petition shall be filed in the Franklin Circuit Court. The petition shall be filed and process issued within thirty (30) days after the day of election; it shall state the grounds of the contest relied on, and no other grounds shall afterwards be relied upon. The contestee shall file an answer within twenty (20) days after the service of summons upon him. The answer may consist of a denial of the averments of the petition and may also set up grounds of contest against the contestant; if grounds are so set up they shall be specifically pointed out and none other shall thereafter be relied upon by the party. Any candidate who would have been qualified to bring a contest action under this section, who is a party to a recount proceeding under KRS 120.185, may, by filing answer in

the recount proceeding within the time allowed by this section for filing grounds of contest, set forth grounds of contest against the petitioner in the recount proceeding. A reply may be filed within ten (10) days after the answer is filed; its affirmative allegations shall be treated as controverted, and no subsequent pleading shall be allowed. (Enact. Acts 1974, ch. 130, § 163.)

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§ 150. Disqualification from office for using money or property to secure or influence election—Corporation not to use money or other thing of value to influence election—Exclusion from office for conviction of felony or high misdemeanor—Laws to regulate elections.—Every person shall be disqualified from holding any office of trust or profit for the term for which he shall have been elected who shall be convicted of having given, or consented to the giving, offer or promise of any money or other thing of value, to procure his election, or to influence the vote of any voter at such election; and if any corporation shall, directly or indirectly, offer, promise or give, or shall authorize, directly or indirectly, any person to offer, promise or give any money or anything of value to influence the result of any election in this State, or the vote of any voter authorized to vote therein, or who shall afterward reimburse or compensate, in any manner whatever, any person who shall have offered, promised or given any money or other thing of value to influence the result of any election or the vote of any such voter, such corporation, if organized under the laws of this Commonwealth, shall, on conviction thereof, forfeit its charter and all rights, privileges and immunities thereunder; and if chartered by another State and doing business in this State, whether by license, or upon mere sufferance, such corporation, upon conviction of either of the offenses aforesaid, shall forfeit all right to carry on

any business in this State; and it shall be the duty of the General Assembly to provide for the enforcement of the provisions of this section. All persons shall be excluded from office who have been, or shall hereafter be, convicted of a felony, or of such high misdemeanor as may be prescribed by law, but such disability may be removed by pardon of the Governor. The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult or other improper practices.

* * * * * * * *

§ 151. Person guilty of fraud, intimidation, bribery or corrupt practice to be deprived of office by suitable statutory means.—The General Assembly shall provide suitable means for depriving of office any person who, to procure his nomination or election, has, in his canvass or election, been guilty of any unlawful use of money, or other thing of value, or has been guilty of fraud, intimation, bribery, or any other corrupt practice, and he shall be held responsible for acts done by others with his authority, or ratified by him.

Cited: Commonwealth v. Headley (1901), 111 Ky. 815, 23 K. L. R. 1104, 64 S. W. 744; Ridings v. Jones (1926), 213 Ky. 810, 281 S. W. 999; Hart v. Rose (1934), 255 Ky. 576, 75 S. W. (2d) 43; Commonwealth ex rel. Funk v. Huntsman (1951), 237 S. W. (2d) 876.

* * * * * * * *

§ 161. Compensation of city, county or municipal officer not to be changed after election or appointment or during term, nor term extended.—The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office; nor shall the term of any such officer be extended

beyond the period for which he may have been elected or appointed.

* * * * * * * *

§ 235. Salaries of public officers not to be changed during term—Deductions for neglect.—The salaries of public officers shall not be changed during the terms for which they were elected; but it shall be the duty of the General Assembly to regulate, by a general law, in what cases and what deductions shall be made for neglect of official duties. This section shall apply to members of the General Assembly also.

* * * * * * * *

AFFIDAVIT AND CERTIFICATE

Affiant states pursuant to Rules 28 and 35 of the Supreme Court of the United States of America, that on the 15th day of December, 1981, he deposited at the United States Post Office, Sixth and Broadway Streets, Louisville, Kentucky 40201, with first-class postage prepaid, copies of this brief as follows: Office of the Clerk, Supreme Court of the United States of America, Washington, D.C. 20543; Steven L. Beshear, Esq., Attorney General, Commonwealth of Kentucky, Frankfort, Ky. 40601; Fred M. Goldberg, Esq., Jonathan Goldberg, Esq., Goldberg & Simpson, PSC, 2800 First National Tower, Louisville, Ky. 40202; Office of Clerk, Supreme Court of Kentucky, State Capitol Building, Frankfort, Kentucky 40601; Office of Clerk, Court of Appeals of Kentucky, Bush Building, 403 Wapping Street, Frankfort, Ky. 40601; Office of Clerk, Jefferson Circuit Court, Louisville, Ky. 40202; Victor L. Baltzell, Jr., Esq., Connelly, Kaercher, Baltzell & Stamper, 219 Marion E. Taylor Building, Louisville, Ky. 40202; and Mr. Earl J. Hartlage, 4115 Bramers Lane, Louisville, Ky. 40216.

Affiant further states this to be done in compliance with the rules of this Court and knows of no one else entitled to notice or a copy of this brief.

That said service was within the time specified for filing.

Further affiant sayeth not.

L. STANLEY CHAUVIN, JR.

Subscribed and sworn to before me by L. Stanley Chauvin, Jr. this 15th day of December, 1981.

My commission expires September 9, 1985.

Notary Public, State at Large, Ky.